

ASYLUM LAW IN SCOTLAND: DEVELOPMENTS OVER THE LAST YEAR

Scott Blair is an Advocate in practice at the Scottish Bar. He works mainly in the public law field.

In Scotland the Supreme civil Court is the Court of Session. It is a two tier court. The Outer House deals with first instance work. A single judge hears cases in the Outer House. The Inner House deals with civil appellate work. It sits in divisions consisting of 3 or more judges.

In asylum and immigration terms petitions for judicial review are dealt with in the Outer House. Applications for statutory review on the papers alone are also dealt with in the Outer House. There is no separate administrative court. The Inner House deals with appeals from decisions made in the Outer House. It also considers applications for leave to appeal from the Asylum and Immigration Tribunal. The Inner House determines substantive appeals from the AIT where leave has been granted by the Court or by the AIT. An Outer House judge can refer a statutory review petition to the Inner House for oral argument. To date this has not been done.

Decisions of the Scottish Courts are available from their website www.scotcourts.gov.uk. BAILII also carries Scottish cases. Where the cases have been reported the citation has been given. Although the volume of cases coming to the Scottish courts is small compared with England it is still significant. The following are a small sample of the cases heard in the Court of Session over the last year.

Looking to the Inner House first there has been a number of interesting cases.

In *Torabi v. Secretary of State for the Home Department* 2006 SLT 459, the Inner House dealt with an appeal from the old Immigration Appeal Tribunal. The appellant is being prosecuted for adultery in Iran where the penalty could be death by stoning. She denies the charge.

The Tribunal held that she was not at a real risk of a breach of Article 3 ECHR. It did not accept that there was a real risk of her being convicted of adultery. It held that the test was whether there was a real risk of a “perverse decision” rather than a real risk of stoning. The Tribunal took into account the fact that she denied adultery. The Tribunal had rejected the argument that the trial would be unfair.

The Inner House allowed the appeal and remitted the appeal back to the new Asylum and Immigration Tribunal for reconsideration in light of the evidence on risk.

On her case based on fair trial rights under Article 6 ECHR, the Court accepted that the Article 6 could be engaged in removal to a country which was not a signatory to the ECHR. Following *R (Ullah) v. Special Adjudicator* [2004] 2 AC 323 the appellant

had to show that there was a real risk of a flagrant breach of Article 6 before the United Kingdom would be in breach.

The Court held that the Tribunal had failed to provide proper reasons on the evidence for the finding that the court procedures in Iran in criminal trials would not be unfair. There was evidence that the word of a woman was worth half that of a man, that possibly judges also acted as prosecutors in the same case and that proceedings might be conducted in camera.

The Tribunal also erred in not taking into account the seriousness of the penalty in the assessment of whether there would be a flagrant breach of Article 6. It must follow that the more that is at stake at trial the less easy it will be for the Tribunal to disregard failings in foreign trial proceedings which fall short of Article 6 standards.

On the Article 3 issue Tribunal had also gone wrong. The question of the fairness of the trial was relevant to the assessment of the reality of risk of a breach of that Article. It follows that on a pure Article 3 point any unfairness at trial does not have to reach the high test of a flagrant breach of Article 6 for it to be relevant to risk under Article 3. Whilst a flagrant breach of Article 6 will always be a bar to return, lesser forms of unfairness may still be relevant to the question of risk under Article 3. The Tribunal had not taken consideration into account.

Second, the Court held that the Tribunal had been wrong to distinguish *Jabari v. Turkey* [2001] INLR 136. In that case the Strasbourg Court held that the decision to expel an Iranian woman who had admitted adultery and who was being prosecuted in Iran violated Article 3. The Tribunal had sought to distinguish *Jabari* on the basis that here the appellant denied adultery.

The Court accepted that her denial was a factor in the assessment of risk it went too far to say that because the Tribunal accepted the denial of adultery that an Iranian court would do likewise or that any finding of guilt would necessarily be perverse. The correct test was whether there was a real risk of treatment contrary to Article 3.

Currently awaiting a decision from the Inner House is the case of *Helow, Petitioner*. An Outer House judge dismissed a petition for statutory review of the refusal of an asylum appeal brought by a Palestinian woman. The woman had been involved in the attempt to prosecute Ariel Sharon in the Belgian courts for alleged complicity in the 1982 Sabra/ Shatila massacres.

Her involvement in the prosecution was central to her claims that she was at risk from Israeli and other agencies. The judge in question is Jewish and is a member of the International Association of Jewish Lawyers and Jurists, a body open to Jews and non-Jews. The official journal of the Association had published a series of articles which were highly critical of the Belgian proceedings. Allegations were made that the proceedings were brought and manipulated by terrorist elements. Other articles were highly critical of Palestinian activism in general. The Inner House heard argument along the lines of the *Pinochet* case that the involvement of the judge in question gave rise to an appearance of apparent bias, not because of her Jewish faith but because of her links to the Association.

In *Koca v. SSHD* 2005 1 SC 487, the Inner House reversed an Outer House decision to dismiss a judicial review of an asylum appeal hearing. There had been no HOPO and a material point on credibility had not been put by the adjudicator, Mrs SM Agnew. The point had arisen after the issue of the RFRL which had doubted the credibility of the claim albeit only in general terms.

The Inner House held after a review of authority, including international authority, that the hearing had not been fair. The Outer House had been wrong to treat the case like an ordinary trial of the facts. The proceedings were not adversarial in the ordinary sense. There was an interest in reaching the correct outcome given what was at stake. The Court considered the *Surendran* guidelines but these were not definitive of the circumstances in which an adjudicator should raise a matter going to credibility not raised by the Home Office.

In *Barychev v. SSHD* [2006] CSIH 6 the Inner House restored the decision of an adjudicator who had held that internal flight was not open to a Russian asylum seeker faced by persecution by a political opponent with some support from some state agencies. The IAT had held that there had been insufficient evidence to hold that there was no internal flight option. The Inner House disagreed. The IAT had acted as if it were determining the appeal afresh. The adjudicator had been entitled to reach the decision he did and had not erred in law.

Davidov v. SSHD [2005] CSIH 51 offers discussion of conscientious objection in the context of an Orthodox Christian seeking to avoid compulsory service in the Israeli army.

Looking now to the Outer House, in *Erdem v. SSHD* [2006] CSOH 29, a decision of the Home Secretary to refuse to entertain fresh representations on an Article 8 ECHR claim as amounting to a fresh claim was the subject of successful challenge.

In *BM v. SSHD* [2005] CSOH 97, the IAT had recorded in a decision refusing leave to appeal and as contended by the appellant, that there was some doubt as to whether there had been interpretation problems during the course of an appeal which had ended in an adverse credibility finding. Leave to appeal was still refused. The Court held that the doubts were a compelling reason under Rule 18 of the Immigration and Asylum Appeals (Procedure) Rules 2003 for leave to have been granted.

Wani v. SSHD 2005 SLT 875 is a decision on credibility. It considers and offers useful analysis of the approach to be taken to the issue of whether a claim is inherently implausible or in conflict with common sense.

Kader v. SSHD [2005] CSOH 71 was a judicial review of a decision of the old IAT to refuse leave to appeal. The petitioner had not known of the date of his asylum appeal hearing because of the fault of his previous solicitors. His appeal was dismissed. An application for late leave to appeal was allowed by the IAT but dismissed on the merits. Judicial review was refused. The Court accepted that the solicitors had been at

fault. However the adjudicator had been entitled to reach the decision he did on the merits. Nothing turned on the absence of the petitioner notwithstanding his argument that an oral hearing was of high importance in an asylum appeal.

Hopefully this review of Scottish case law will be of interest to those not familiar with the Scottish system. Scottish cases are of persuasive authority in the other UK jurisdictions. Equally the Scottish courts are not bound by decisions made in other UK courts. It is hoped that further updates on developments in Scotland will follow in future issues.